

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 5, 2004 Session

LILLIAN ANNETTE MUMFORD v. JOE LESLIE MUMFORD

Appeal from the Circuit Court for Knox County

No. 85825 Bill Swann, Judge

FILED MARCH 12, 2004

No. E2002-01338-COA-R3-CV

After five years of marriage, Lillian Annette Mumford (“Wife”) filed for a divorce from Joe Leslie Mumford (“Husband”). Husband also filed for a divorce. The Trial Court appointed a Special Master to handle discovery disputes and bifurcated the trial separating the issues of divorce and property division. During the first portion of the bifurcated trial, the Trial Court heard fault proof and found that both parties were entitled to a divorce and declared the parties divorced pursuant to Tenn. Code Ann. § 36-4-129. In the second portion of the bifurcated trial, the Trial Court divided the marital property. Wife appeals raising issues concerning the Trial Court’s discovery dispute resolution process and the Trial Court’s division of marital property. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, J., and CHARLES D. SUSANO, JR., J., joined.

Douglas J. Toppenberg, Knoxville, Tennessee, for the Appellant, Lillian Annette Mumford.

Joe Leslie Mumford, Knoxville, Tennessee, pro se Appellee.

OPINION

Background

Husband and Wife were married in 1995. There are no children of this marriage. In July of 2000, Wife filed a complaint for divorce in the Fourth Circuit Court for Knox County (“Trial Court”). A few days later, Husband filed a complaint for divorce in the Chancery Court for Knox County. Husband’s complaint was transferred to the Trial Court and treated as a counter-complaint by order entered in August of 2000.

The record reflects serious acrimony between the parties and is replete with allegations of numerous types of misconduct. Each party has accused the other of doing such things as spray painting obscenities on the interior walls of the parties' home, keying the other's car, stealing the other's personal belongings, fraudulently obtaining credit cards in the other's name then running up balances and refusing to pay in order to ruin the spouse's credit rating, and even firing shots at the other.

The record further shows numerous discovery disputes. In May of 2001, the Trial Court entered an order appointing a special master to handle discovery matters. Disputes regarding discovery continued. In July of 2001, Wife filed a motion for default judgment requesting the Trial Court dismiss Husband's counter-complaint due to Husband's alleged failure to cooperate in the discovery process. In September of that year, Husband filed a motion requesting the Trial Court to grant separate trials for the divorce and the division of property, claiming that Wife was engaging in tactics solely for the purposes of delaying the divorce.

The Special Master heard testimony and then filed his report in October of 2001. In that report, the Special Master found there was "much animosity and ill-will between the parties" that had "spilled over into the discovery process between counsel for the respective parties," but that the failure of the discovery process was "a direct result of the actions, or lack thereof, of the parties themselves." The Special Master also found that although Husband was not without fault in frustrating the discovery process, the Wife had "set about an intentional and unwavering pattern of frustrating the discovery process." The Special Master did not find that the granting of a default judgment was the proper remedy for Wife's failure to cooperate with discovery requests in this case, but did recommend that judgment be entered requiring Wife to pay to Husband \$800 in attorney fees for her failure to cooperate. The Special Master also stated all discovery requests should be answered fully by Wife.

Wife filed exceptions to this Special Master's report within the ten day period allowed by Tenn. R. Civ. P. 53 seeking a *de novo* hearing because, among other things, the Special Master did not set forth specific findings to support his conclusions in the report and the report was filed nearly three months after the hearing and not, Wife alleged, "with all reasonable diligence" as required by Rule 53 of the Tennessee Rules of Civil Procedure. In December of 2001, the Trial Court entered an order holding that the issues of divorce and of the equitable distribution of marital property would be tried separately. The December order set a date certain for the trial of the divorce issues "without any further delays by either party." This order also dismissed Wife's motion taking exceptions to the Special Master's report and ordered Wife to comply with the Special Master's findings.

On December 10, 2001, during a pretrial conference, Wife argued to the Trial Court that the findings contained in the Special Master's report were not specific enough to inform the parties of what each was expected to do. The Trial Court reviewed the report and agreed. The Trial Court in its Trial Management Order entered January 23, 2002, remanded the matter to the Special Master for more specific findings.

On January 25, 2002, the Special Master served notice of the filing of an amended report specifically delineating which discovery requests needed to be complied with and reconfirming his prior recommendation that judgment be entered against Wife in favor of Husband for \$800 for attorney fees. Wife filed objections to the amended Special Master's report on February 12, 2002.

On March 12, 2002, the Trial Court held the first portion of the bifurcated trial, which dealt solely with the issue of divorce. Wife requested a continuance claiming she had suffered a fall and visited the emergency room the night before. The Trial Court granted a continuance for the portion of the trial dealing with property issues, but refused to grant a continuance on the issue of divorce.

Prior to hearing proof, the Trial Court announced it intended "to receive only sufficient fault proof today to pass upon the sufficiency of grounds to pronounce a divorce to either or both sides." The Trial Court further stated it would "honor parties' religious practices if they need to . . . find the other side blameworthy," but would not "litigate fault cases for the joy of fault cases." Counsel for Wife indicated he did not know of any "religious factors in play here," but stated the parties were both members of a small community in Kentucky and wanted a ruling regarding fault.¹

The Trial Court heard testimony from both Husband and Wife, but urged counsel to keep the proof brief and after testimony began stated that the fault proof would be "roughly five minutes on a side." The Trial Court also noted that neither party alleged spousal support issues and therefore, fault was not necessary for a support determination. After hearing brief testimony from both parties, the Trial Court pronounced the parties divorced. In its order entered March 19, 2002, the Trial Court found that both parties were entitled to a divorce and directed entry of a final order as to the issue of divorce finding no just reason for delay pursuant to Tenn. R. Civ. P. 54.02.

The case proceeded to the second portion of the bifurcated trial dealing with the equitable distribution of marital property. After this trial, the Trial Court issued a memorandum opinion from the bench and entered an order on March 14, 2003, *nunc pro tunc* to October 29, 2003.² In the March 14, 2003, order, the Trial Court, *inter alia*, ratified the distribution of personal property accomplished by the parties' taking turns choosing items and found this distribution to be equitable. The Trial Court then distributed the remaining debts and assets. As relevant to the issues on appeal, the Trial Court divided and distributed as marital property the parties' AmSouth accounts and a NBC Bank account equally between Wife and Husband, awarded Wife the \$3,800 in a Keesler Federal Credit Union account as Wife's portion of Husband's retirement earned through that point in time, awarded Husband 100% of his future military retirement pay 18% of which was stipulated to be marital property, and awarded Wife one-half of any portion of Husband's retirement plan earned in

¹ Wife received this ruling regarding fault when the Trial Court found that both parties were entitled to a divorce.

² The date of October 29, 2003, obviously was a clerical error as the clear intention of the Trial Court was that the order was to be entered *nunc pro tunc* to October 29, 2002.

association with his employment with the Social Security Administration during the marriage. The Trial Court found that two NBC Bank accounts in Wife's name containing approximately \$1,000 and \$13,000 respectively were the separate property of Wife as Wife had received these monies as a gift from a third-party. The Trial Court ordered that any debt or encumbrance associated with the personalty divided between Wife and Husband would be the responsibility of the party to whom the asset had been awarded. Further, the Trial Court found that the debt to the University of Colorado incurred by Wife would be borne solely by Wife. The Trial Court also held that the benefit of the debt to First Premier flowed to Wife and that Wife shall be responsible for this debt in the amount of \$638.99. The Trial Court was unable to make findings of fact regarding who had incurred the debts to Best Buy and Oak Express and declined to allocate these debts to either party, leaving "the creditors and the parties to rely upon their remedies at law for the collection and payment of the same."

Wife appeals to this Court.

Discussion

Although not stated exactly as such, Wife raises four issues on appeal: 1) whether the Trial Court erred in refusing to hear her exceptions to the amended Special Master's report; 2) whether the Trial Court's policy of refusing to hear discovery disputes prior to trial as based upon the Trial Court's local *Turner v. Turner* rule violated Wife's procedural due process rights; 3) whether the Trial Court's refusal to hear discovery disputes impaired a substantial right of Wife; and 4) whether the Trial Court's division of marital property was inequitable and an abuse of discretion. Husband, *pro se*, raises as an issue his claim that Wife and her counsel are maliciously prosecuting him. We will address each issue in turn.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

We begin by considering whether the Trial Court erred in refusing to hear Wife's exceptions to the amended Special Master's report. Rule 53.04 of the Rules of Civil Procedure provides, in pertinent part:

In an action to be tried without a jury the court shall act upon the report of the master. Within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6.04. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Tenn. R. Civ. P. 53.04(2). Once objections are timely filed, it is “incumbent upon the Trial Judge to review the evidence and any exhibits and if he disagree[s] with the findings of the Master, make independent findings.” *Jackson v. Jackson*, No. E2001-00287-COA-R3-CV, 2001 Tenn. App. LEXIS 657, at *13-14 (Tenn. Ct. App. Sept. 5, 2001), *no appl. perm. appeal filed*; *Fillers v. Cash*, No. 03A01-9705-CV-00186, 1997 Tenn. App. LEXIS 763, at *4-5 (Tenn. Ct. App. Oct. 31, 1997), *no appl. perm. appeal filed*.

Husband argues Wife’s objections to the amended Special Master’s report were not filed timely. Wife argues they were. Therefore, we first must determine if the objections to the amended Special Master’s report were timely filed making it incumbent upon the Trial Court to hear the objections. Rule 6 of the Tennessee Rules of Civil Procedure, provides, in pertinent part:

6.01. Computation. - In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the date of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period as computed is to be included unless it is a Saturday, a Sunday, a legal holiday, or a day when the clerk’s office for filing is closed, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or a day when the clerk’s office for filing is closed. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

* * *

6.05. Additional Time after Service by Mail. - Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party and the notice or paper is served upon such party by mail three (3) days shall be added to the prescribed period.

Tenn. R. Civ. P. 6.

The amended Special Master’s report contains a certificate of service that shows it was served upon the parties by mail on January 25, 2002. Pursuant to Rule 53.04 of the Rules of Civil Procedure, the parties had ten days from January 25, 2002, to file objections to the report. As this time period is less than eleven days, Rule 6 of the Rules of Civil Procedure commands that intermediate Saturdays, Sundays, and legal holidays shall be excluded from the calculation. In addition, since the report was served by mail, Rule 6 provides that an additional three days are added to the prescribed period. Rule 6 also instructs that the date of the act, the serving of notice of the filing of the amended report in this case, is not counted.

Excluding intermediate Saturdays and Sundays³, the ten day period ended on Friday, February 8, 2002. However, pursuant to Rule 6, three days then must be added to this time period because notice of the filing of the amended Special Master's report was served upon the parties by mail. The Saturday and Sunday covered by this three day period, February 9 and 10, 2002, are counted in the three days as Rule 6.05 does not exclude Saturday and Sunday from the three days that must be added to the prescribed period. Thus, Wife's objections to the Special Master's report should have been filed by Monday, February 11, 2002. As Wife did not file or serve her objections until February 12, 2002, outside the ten day period allowed by Tenn. R. Civ. P. 53, the Trial Court was not required to hear the objections. The Trial Court, however, was required to "act upon the report of the master." Tenn. R. Civ. P. 53.04. The Trial Court did act upon the report by adopting it in its entirety. We hold that Wife's objections were not filed timely and the Trial Court did not err by refusing to hear these objections.

We will consider Wife's second and third issues together as our ruling upon these issues hinges upon the fact that Wife did not file objections to the amended Special Master's report timely, as discussed above.

Wife asserts that the Trial Court applied the Trial Court's local *Turner* rule and refused to hear discovery disputes and that this refusal violated her due process rights and impaired a substantial right of Wife's. Wife's assertion that the Trial Court refused to hear and handle discovery disputes is incorrect. The Trial Court handled the discovery disputes in this case by referring discovery to a Special Master. Under Rule 53 of the Rules of Civil Procedure, the Trial Court had the power to appoint a Special Master. Tenn. R. Civ. P. 53.01. When Wife timely filed objections to the first Special Master's report, the Trial Court heard these objections and sent the matter back to the Special Master for more specific findings. The Special Master then filed an amended report. Wife filed and served objections to the amended report, but, as discussed above, these objections were not filed or served timely. The Trial Court did not apply a blanket rule refusing to hear discovery disputes in this case. Rather, the Trial Court heard the discovery disputes by exercising its power to appoint a Special Master to deal with the discovery disputes. While a trial court's application of a local rule refusing to hear discovery disputes in violation of the Tennessee Rules of Civil Procedure would be error, that did not happen in this case. Even if the Trial Court did err by "relying on its *Turner* protocol for the resolution of discovery issues", which apparently provides for the resolution of some discovery disputes after trial, we hold the Trial Court certainly had the discretion not to hear Wife's exceptions to the amended Special Master's report as these objections were not timely. The Trial Court, in effect, exercised its discretion properly in refusing to hear those untimely objections. The Trial Court reached the right result even if perhaps for the wrong reason. As such, we find Wife's second and third issues also to be without merit.

We next consider whether the Trial Court's division of marital property was inequitable and an abuse of discretion. Courts must look to Tenn. Code Ann. § 36-4-121 when

³There were no legal holidays during this time period.

determining how to distribute marital property. In pertinent part, Tenn. Code Ann. § 36-4-121 provides:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121 (c) (2001).

A trial court has wide discretion in dividing the interest of the parties in marital property. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). As noted by this Court in *King v. King*, when dividing marital property:

The trial court's goal in every divorce case is to divide the parties' marital estate in a just and equitable manner. The division of the estate is not rendered inequitable simply because it is not mathematically equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because each party did not receive a share of every item of marital property. *Brown v. Brown*, 913 S.W.2d [163] at 168. . . . In the final analysis, the justness of a particular division of the marital property and allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. App. 1990).

King v. King, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (quoting *Roseberry v. Roseberry*, No. 03A01-9706-CH-00237, 1998 Tenn. App. LEXIS 100, at *11-12 (Tenn. Ct. App. Feb. 9, 1998)), *no appl. perm. appeal filed*.

“In cases involving a marriage of relatively short duration, it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place.” *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). In *Batson*, this Court found that a marriage of a little over five years was a marriage of relatively short duration. *Id.* at 859-60. Here the marriage also is of a relatively short duration.

Wife does not complain about the manner in which the items of marital personal property were divided. Nor does she contest the division of most of the marital assets. Wife complains only about the Trial Court's distribution to Husband of 100% of Husband's future military retirement pay, 18% of which was marital property, and about the fact that the Trial Court allocated to Wife what Wife considers to be “all of the marital debts.” Wife complains that the final division of marital property disproportionately favors Husband and states in her appellate brief that the Trial Court divested her of her interest in Husband's military retirement “without any findings or explanation.”

Wife's assertion that the Trial Court divested her of an interest in Husband's future military retirement “without any findings or explanation” is incorrect. The Trial Court did make findings and provide explanation. In its memorandum opinion dictated October 29, 2002, and entered March 14, 2003, the Trial Court found that this was a brief marriage, that the parties are in good health, and that their earnings are comparable with Husband earning approximately \$38,000 in 2001, and Wife earning approximately \$32,000. In addition, the Trial Court stated:

This Court earlier found the husband to have damaged the marital residence and directed him to restore the same to marketable condition. He did that. The proof

appeared clear at that time, and it has subsequently become somewhat cloudy. The Court cannot now find with certainty that its own pendente lite directive to the husband was appropriate. We do not find it inappropriate. We simply call it into question at this time.

Whatever the circumstances may have been, and whoever desecrated the house, the husband was overcharged 100 percent with its repair and the labors necessary to do the same. That was perhaps in error.

Further, the Trial Court found that Husband had continued to make payments to preserve marital assets, which the Trial Court was able to divide equitably. Additionally, the Trial Court specifically awarded Wife the \$3,800 in the Keesler Federal Credit Union account as Wife's portion of Husband's retirement earned through that point in time.

The Trial Court also made findings regarding credibility, stating:

Certainly as to debts, the Court sincerely questions whether it is not more likely to conclude that the Best Buy and Oak Express debts were incurred by the wife and that she has accordingly testified falsely today. We cannot and do not so find.

However, the Court does find that as to credibility generally, the husband's testimony is superior. The husband's testimony is abrasive. There is no question about that. It's frequently rambling, no question about that. It's hard on attorneys, no question about that. However, in pertinent part, it is always trenchant and on point.

That and the findings as to credibility underpin what the Court has done in equitable distribution here today.

In contrast to finding Husband's testimony credible, the Trial Court stated that "wife is a master of colloquial conversational misdirection, colloquial conversational misdirection. It is hard to know what, if any, deception she has engaged in as to assets."

As far as the marital debts, the Trial Court directed that debts associated with the items of personal property would be assigned to the party who chose that item. The Trial Court directed that Wife would be responsible for the debt to the University of Colorado incurred by Wife for her education and for the First Premier debt in the amount of \$638.99. As for the debts to Best Buy and Oak Express, the Trial Court stated:

[T]hese accounts were opened during the marriage while the parties were going through extraordinary difficulty, and the Court is not able to find with sufficient certainty who incurred the same, be it the husband, be it the wife, or be it a third person.

These parties and the credit grantors are left to their remedies at law touching upon Best Buy and Oak Express.

“When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings.” *Seals v. England/Corsair Upholstery Mfg. Co.*, 984 S.W.2d 912, 915 (Tenn. 1999) (quoting *Collins v. Howmet Corp.*, 970 S.W.2d 941, 943 (Tenn.1998)).

The evidence in the record does not preponderate against the Trial Court’s findings. This was a marriage of relatively short duration lasting only five years. In fact, soon this divorce proceeding will have been in existence almost as long as the marriage was prior to Wife’s filing for divorce. The Trial Court considered the relevant statutory factors when distributing the marital property including, among others, the duration of the marriage; the age, health and earning capacity of each party; the ability of each party to acquire assets and income in the future; and the value of each party’s separate property. Additionally, the Trial Court specifically found that it was perhaps in error when it earlier required Husband to be 100% responsible for repairs of the damage to the marital residence. Further, the Trial Court specifically found that Husband had continued to preserve marital assets by making payments on those assets which enabled the Trial Court to make an equitable division of those assets. The fact that Wife did not receive a share of one item of marital property, Husband’s future military retirement pay, does not make the overall distribution inequitable. The evidence does not show that the distribution of the overall marital estate disproportionately favors Husband. In addition, contrary to Wife’s assertion, she was not allocated “all of the marital debts.” The Trial Court properly considered the relevant statutory factors when dividing the marital estate and made findings of fact and credibility determinations, and the evidence does not preponderate against those findings, including the Trial Court’s implicit finding that this is an overall equitable distribution.

Likewise, neither do we find that the Trial Court abused its discretion in equitably dividing this marital estate. Our Supreme Court discussed the abuse of discretion standard in *Eldridge v. Eldridge*, stating:

Under the abuse of discretion standard, a trial court’s ruling “will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made.” A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

Appellate courts ordinarily permit discretionary decisions to stand when reasonable judicial minds can differ concerning their soundness. *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999). A trial court’s discretionary decision must take into account applicable

law and be consistent with the facts before the court. *Id.* When reviewing a discretionary decision by the trial court, the “appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision.” *Id.*

We believe that reasonable minds could disagree as to the propriety of the decision made by the Trial Court as to the division of the marital property, the very essence of a discretionary decision. Given all this, we will not substitute our judgment for that of the Trial Court, and, therefore, we affirm the Trial Court’s distribution of the marital property in all respects.

Finally, we turn to Husband’s issue regarding malicious prosecution. We note that this issue was not raised in the Trial Court. As the issue was not raised in the Trial Court, it is not properly before us on appeal. We, therefore, decline to address this issue.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellant, Lillian Annette Mumford, and her surety.

D. MICHAEL SWINEY, JUDGE